COMMONWEALTH OF KENTUCKY
KENTUCKY SUPREME COURT
2015-SC-000224-D

KENTUCKY RIVER FOOTHILLS DEVELOPMENT COUNCIL, INC. — APPELLANT

v. **(On Appeal from Court of Appeals 2013-CA-001858)**
(On Appeal from Madison Circuit Court 11-CI-00743)

CATHY PHIRMAN, Administratrix of the Estate of MELISSA STEFFEN, JOANNE GILLIAM and DARYLL GILLIAM as Guardians of CONNER KEITH GILLIAM, and CARTER RAY GILLIAM, unmarried infants — APPELLEES

REPLY BRIEF OF APPELLANT, KENTUCKY RIVER FOOTHILLS DEVELOPMENT COUNCIL, INC.

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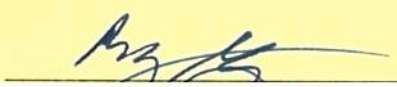
CERTIFICATE OF SERVICE

It is hereby certified that true and accurate copies of the foregoing were hand-delivered on June 21, 2016, to Susan Stokley Clary, Clerk of the Supreme Court of Kentucky, State Capitol Building, Room 209, 700 Capitol Avenue, Frankfort, KY 40601. I hereby further certify that true and correct copies of the foregoing were served upon Douglas L. Hoots, Landrum & Shouse, LLP, 106 West Vine Street, Suite 800, P.O. Box 951, Lexington, Kentucky 40507-0951; J.T. Gilbert, Coy, Gilbert, Shepherd & Wilson, 212 North Second Street, Richmond, Kentucky 40475; William G. Clouse, Jr., Madison Circuit Court Judge, 101 West Main Street, Richmond, Kentucky 40475; and Samuel P. Givens, Jr., Clerk of the Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky 40601, by U.S. Mail, on this the 21st day of June, 2016. I further certify that the Record on Appeal was not withdrawn by the undersigned counsel.



STATEMENT OF POINTS AND AUTHORITIES

INTRODUCTION

As an adoptive child of the counties it is designed to serve in performing the essential state function of alleviating poverty, Appellant is entitled to sovereign immunity. The jural rights doctrine does not supplant this defense, which was timely asserted by Appellant below. Appellant therefore seeks reversal of the Opinions of the Kentucky Court of Appeals and the Madison Circuit Court.

ARGUMENT

I. Kentucky River is entitled to sovereign immunity.

Appellant is not seeking a dramatic expansion of this Court's holding in *Comair, Inc. v. Lexington-Fayette Urban County Airport Corp.*, 295 S.W.3d 91 (Ky. 2009) as Appellees suggest.[1] Instead, Appellant submits it squarely meets the requirements for sovereign immunity set forth in *Comair*, including that its parent is an immune entity and that it performs an integral function of state government. *Id.* at 102. Therefore, simply following *Comair* – not expanding it – merits reversal of the lower courts' determinations.

As set forth at length in its initial brief, Appellant's designation as a community action agency fundamentally changed the nature of the entity, subjected it to government regulation and oversight, rendered the counties it serves as the "parent" for the purpose of

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[1] Appellees argue throughout her brief that Appellant's requested application of *Comair* would greatly expand the doctrine of sovereign immunity. Appellees, however, never articulates why this is so. Appellant submits that, like any immunity analysis, each entity seeking immunity must be judged on its unique facts. For example, holding that Appellant is entitled to immunity under *Comair* would not extend immunity to all community action corporations, since community action corporations can be created by non-immune cities and would therefore fail the parentage test in *Comair*. *See* KRS 273.435(1)(b) (permitting designation of a community action corporation by a municipal corporation). Thus, the floodgates alarm being rung by Appellees is a false alarm.

Comair's immunity test, and gave it an essential state function to perform (alleviating poverty). [Appellant's Brief, pp. 10-25.] In briefly addressing *Comair*, the Appellees attempt to argue that the Court of Appeals correctly distinguished Appellant from the Airport Board in *Comair*, but that effort is unavailing. [Appellees' Brief, pp. 12-14.]

First, Appellees argue that the Court of Appeals noted that the statutes creating community action corporations do not themselves confer immunity. [Appellees' Brief, p. 13.] As this Court has previously noted, however, immunity is a constitutional principle that cannot be altered by the General Assembly. *See Kentucky Ctr. for the Arts Corp. v. Berns*, 801 S.W.2d 327, 329 (Ky. 1990). For this reason, a statutory grant is not necessary for an entity to be immune. Indeed, in *Comair*, there was no mention of any legislative grant of immunity to the Airport Board, and yet, the board was deemed entitled to immunity. *Comair*, 295 S.W.3d at 102.

Second, Appellees argue that the Court of Appeals properly concluded that community action corporations are no different from any other non-profit corporation. [Appellees' Brief, pp. 13, 15-16.] Appellees offer little argument to support the accuracy of this finding. Appellant, however, offered a detailed review of the statutes establishing and governing community action agencies, which support the conclusion that there are significant differences between community action agencies and run-of-the-mill non-profit corporations, including: (1) the purpose of a community action agency is expressly limited to "alleviating poverty within a community or area by developing employment opportunities; by bettering the conditions under which people live, learn, and work; and by conducting, administering, and coordinating similar programs," KRS 273.410(2), whereas non-profits have no such limitation; (2) a community action agency's four

powers specified in KRS 273.430 are much more limited than the seventeen powers enumerated in KRS 273.171 for private, nonprofit corporations (Appellant does not, for instance, have the power to cease operations, to indemnify its directors, to elect its own directors, to operate outside of its designated territory, or to sue or be sued);[2] (3) a community action agency is required to conform its board to statutory requirements imposed by KRS 273.405, and a typical non-profit corporation is subject to no such requirement; and (4) a community action agency must subject itself to significant government oversight, including submitting budgets to the Department for Local Finance, submitting to annual audits by the state auditor, and submitting financial statements to the Fiscal Courts. [Appellant's Brief, pp. 10-18.] As these statutes demonstrate, designation as a community action corporation fundamentally alters the purpose, powers, and governance of the entity and subjects it to governmental oversight.

Third, Appellees emphasize that Appellant was a non-profit corporation before it was designated as a community action agency. [Appellees' Brief, p. 13.] Here again, Appellees fail to explain how this is relevant to the immunity analysis. In *Comair*, the Airport Board existed as a non-profit entity before the merger of the City of Lexington and Fayette County, but *Comair* nevertheless found that the merged county government, an immune entity, became the "(possibly adoptive) parent" of the Airport Board. *Comair*, 295 S.W.3d at 100. Likewise, Appellees make no effort to distinguish *University of Louisville v. Martin*, 574 S.W.2d 676 (Ky. 1978), where the University of

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[2] Appellees persist in arguing that a community action corporation has the same powers as a regular non-profit corporation, including the power to sue and be sued and make contracts and incur liabilities. [Appellees' Brief, p. 15.] This is simply inaccurate. The general powers of a community action agency are the four powers listed in KRS 273.430, which are much narrower than those powers of a private, non-profit corporation set forth in KRS 273.171. *Compare* KRS 273.430 *with* KRS 273.171.

Louisville, originally created as a private organization, was found entitled to immunity when it was designated as a public university. As these cases make clear, a non-immune entity can be adopted by an immune entity. Here, Appellant's designation as a community action agency made it the adopted child of Clark County, Estill County, Powell County, and Madison County.

Fourth, Appellees argue that the Court of Appeals correctly concluded that the counties have little involvement in the day-to-day operation of Appellant. [Appellees' Brief, p. 13.] To the contrary, Appellant has argued that, by statute, the counties and state have significant governance, oversight, and regulatory roles and because its operations were fundamentally altered by its designation as a community action agency. [Appellant's Brief, pp. 10-18.] Furthermore, the Court of Appeals and Appellees cited no case law to support the proposition that the state or county must be involved in the day-to-day operation of an immune entity before it meets the requirements of the *Comair* test. Indeed, any immunity test that required a particular level of day-to-day involvement by the state or county would only generate more litigation over the level of government involvement needed to justify immunity.

Fifth, the Appellees argue that Appellant's contract with the Department of Corrections was not dependent on its community action designation. Appellant operates the Liberty Place Recovery Center for Women, which is one of ten Recovery Kentucky substance abuse recovery centers in the state open to homeless or marginally homeless women with substance abuse issues. [Record, Volume 4, Motion for Summary Judgment on Sovereign Immunity, pp. 512- 21. Affidavit of Jozefowicz, attached to Appellant's Brief as Appendix Tab No. 3.] This function is consistent with Appellant's essential

government function and limited purpose of alleviating poverty by bettering the conditions under which people live, as permitted by KRS 273.410(2). The mere fact that the funding source for Liberty Place (still a governmental source) may not have been the federal community block grant does not require stripping Appellant of its immunity. Indeed, *Comair* recognized that the Airport Board was immune despite the fact that some of its revenues were generated from non-government funding sources, including fees it generated from its own operations. *Comair*, 295 S.W.3d at 102.

Finally, Appellees argue that Appellant's mission of alleviating poverty is not an integral governmental function recognized by *Comair*. [Appellees' Brief, p. 13.] This is inaccurate. In *Marion County v. Rives & McChord,* 118 S.W. 309, 311 (1909), Kentucky's then-highest court recognized that state government functions include "matters ... of provision for the poor." *Comair* quoted *Rives & McChord* favorably and relied on it in determining that the airport entities' performance of transportation services qualified as an essential state function. *Comair*, 295 S.W.3d at 100. *Comair* also noted that certain state government concerns are common to all citizens of the state, but are better addressed on a local level (like by counties). *Id.* at 99. Alleviation of poverty and provision for the poor are exactly the type of concern common to all citizens, but better addressed at the local level.

Appellees cite one post-*Comair* case for the proposition that Appellant is not entitled to immunity, but the case is distinguishable from the present facts. [Appellees' Brief, pp. 20-21.] In *Coppage Constr. Co., Inc. v. Sanitation Dist. No. 1*, 459 S.W.3d 855 (Ky. 2015), this Court applied *Comair* in holding a sanitation district was not entitled to sovereign immunity. Sanitation District No. 1 ("SD1") failed the parentage test because

it was created by a petition of the citizenry it served instead of being "created by the sovereign power of the state...." *Id.* at 861 (internal quotations omitted). Here, however, community action agencies are not created by a petition of county inhabitants; the counties designated Appellant to serve as their community action corporation as permitted by KRS 273.435. In addition, this Court concluded that SD1 failed the *Comair* test because sewer disposal and storm water drainage services were discrete, local services that did not address state-level concerns. *Coppage Constr. Co.*, 459 S.W.3d at 864. As set forth above, however, Appellant's purpose of alleviating poverty addresses what has long been classified as a state-level concern. Thus, *Coppage Constr. Co.* does not preclude finding Appellant to be an immune entity.

Instead of analyzing the application of *Comair* to the present facts, Appellees cite numerous cases that predate *Comair* and have no application here. [Appellees' Brief, pp. 17-20.] For example, the Appellees rely on *Caneyville Volunteer Fire Dep't v. Green's Motorcycle Salvage, Inc.*, 286 S.W.3d 790 (Ky. 2009) to defeat immunity without ever recognizing that the multi-factored test discussed in that case was never adopted in *Comair*.[3] In *Kentucky Ctr. for the Arts Corp. v. Berns*, 801 S.W.2d 327 (Ky. 1990), the Court rejected immunity for the Kentucky Center for the Arts, which owned a performance hall where the plaintiff fell and sustained injury. Although *Comair* rejected

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[3] Appellees argue that Appellant fails the *Caneyville* test for immunity without truly analyzing any of the factors. [Appellees' Brief, pp. 17-18.] Appellant, however, submits that a close analysis of these factors would not yield the conclusory answers offered by the Appellees. As one example, the first factor listed in *Caneyville* is whether the state statutes characterize the entity as an arm of the state. *Caneyville*, 286 S.W.3d at 803. Appellees made no effort to analyze this factor other than to write "Answer: No." [Appellees' Brief, p. 17.] Yet, KRS 273.415 subjects community action agencies to the Interlocal Cooperation Act, which applies only to public agencies defined as "any political subdivision of this state, any agency of the state government or of the United States, a sheriff, any county or independent school district, and any political subdivision of another state." KRS 65.230. Thus, Appellant is statutorily designated as a public agency akin to the state or a county, which are both immune parents under *Comair*. *Comair*, 295 S.W.3d at 94.

the test espoused in *Berns*, Kentucky Center for the Art was not immune because providing an entertainment venue was not an essential governmental function. *Id.* at 332. Here, Appellant's sole purpose is to provide for the poor, which is an essential state function as found by both the Circuit Court and Court of Appeals. *Marion County v. Rives & McChord,* 118 S.W. 309, 311 (1909). Thus, *Berns* is inapposite. Another case relied on by the Appellant, *Kea-Ham Contracting, Inc. v. Floyd Cty. Dev. Auth.*, 37 S.W.3d 703, 705 (Ky. 2000), applied the "*Berns* test" and found that the Floyd County Development Authority was not entitled to immunity because it was not controlled by the central state government and was not supported by state money. *Id.* at 706-07. The "*Berns* test" for immunity, however, was rejected by *Comair* and is not a useful analysis to determine whether Appellant is an immune entity. *Comair*, 295 S.W.3d at 98-99.

Appellees depart even further from the *Comair* test in arguing that because a city housing authority is not immune, Appellant, which adopted some of the policies required by the Kentucky Housing Corporation, should not be immune. This argument misses the mark for several reasons. First, the Paducah Housing Authority's parent is presumably Paducah (a city that is not entitled to immunity), whereas Appellant's parent is the counties it serves (which are entitled to immunity). *See Comair*, 395 S.W.3d at 94. Second, the *Comair* test does not turn on who provided the policies adopted by Appellant, but, even if it did, Appellant got them from the Kentucky Housing Corporation, which is a political subdivision of the state. *See* KRS 198A.020(4). Finally, none of the housing authority cases cited by the Appellees apply the *Comair* test.

In the end, Appellant is an adoptive child of the counties it serves and performs an essential function of state government. For these reasons, it is entitled to sovereign immunity.

II. Sovereign immunity is not supplanted by the jural rights doctrine.

In Sections IV and V of their brief, the Appellees argue that sovereign immunity should not bar their claim because its application would violate the jural rights doctrine. However, this argument must be rejected. "The jural rights doctrine holds that the Kentucky legislature may not abrogate a plaintiff's right of recovery under causes of action in existence at the time of the adoption of our present constitution in 1892." *Sargent v. Shaffer*, 467 S.W.3d 198, 212 (Ky. 2015) (citing *Williams v. Wilson,* 972 S.W.2d 260, 265 (Ky. 1998)). However, the jural rights doctrine "does not trump the doctrine of sovereign immunity." *Fields v. Lexington-Fayette Urban Cty. Gov't*, 91 S.W.3d 110, 112 (Ky. Ct. App. 2001). Indeed, the genesis of the concept of sovereign immunity pre-dates the formation of the Kentucky Constitution or even the formation of America itself. *See* Guy I. Seidman, *The Origins of Accountability: Everything I Know About the Sovereign's Immunity, I Learned from King Henry III*, 49 St. Louis U. L.J. 393, 470 (2005) ("[T]he origins of sovereign immunity were in a procedural bar from the result of feudal conventions. English common law did not believe the king to be infallible but did view sovereign immunity as a doctrine of substantive law."). Accordingly, "jural rights" do not take precedence over the venerated and long-standing principle of sovereign immunity.

Appellees' argument essentially boils down to the assertion that they are entitled to relief for the injuries sustained by Melissa Steffen and it would be inequitable to allow

sovereign immunity to bar them from proceeding with a claim against Appellant. While the facts of this case are tragic, the nature of the underlying facts are not considerations for immunity under *Comair* – sovereign immunity is intended to bar claims against entities such as Appellant, regardless of those types of considerations. Accordingly, Appellees' arguments regarding equity and jural rights must be rejected.

III. Kentucky River asserted sovereign immunity in a timely manner.

Appellees argue that the assertion of the immunity defense by Appellant was "gamesmanship" to avoid a trial in this matter. [Appellees' Brief, pp. 7-11.] This is inaccurate. Immunity (sovereign or governmental) is a non-waivable defense, except by the General Assembly. *See Metro Louisville/Jefferson County Governor v. Abma*, 326 S.W.3d 1, 14 (Ky. App. 2009); *Wells v. Commonwealth, Department of Highways*, 384 S.W.2d 308 (Ky. 1964). In Kentucky, the immunity defense may be raised at any time, even for the first time on appeal. *Commonwealth, Department of Highways v. Davidson*, 383 S.W.2d 346, 348 (Ky. 1964).

Appellant raised the immunity defense in its Motion for Summary Judgment that was filed forty-nine (49) days prior to the scheduled trial in this matter, not on the eve of trial as suggested by the Appellees. Appellees have never suggested to the trial court that it lacked or needed additional time for discovery regarding immunity issues. Now, however, Appellees ask the Court to punish Appellant and deny its right to assert immunity. The Appellees fail to cite any authority for such a sanction. Instead, they rely upon an unpublished opinion by the Kentucky Court of Appeals in *Louisville Metro Housing Development Corp. v. Commonwealth Security, Inc.*, 2013 WL3237480 (Ky. App., June 28, 2013), which is inapposite. The Court in *Louisville Metro* was critical of

the Housing Authority's assertion of immunity in a CR 59 motion *after* a jury verdict had been rendered.[4] That is simply not the case here. Appellant raised immunity in a timely filed Motion for Summary Judgment when discovery was still open. Despite being able to conduct additional discovery (or seek additional time), the Appellees did not seek to take any discovery on this defense. Appellant did not waive the immunity defense and raised it in a timely-filed dispositive motion, and the sanction the Appellees seek should be denied.

CONCLUSION

For these reasons, Appellant respectfully requests that this Court reverse the Opinions of the Kentucky Court of Appeals and the Madison Circuit Court, and that judgment be entered in favor of Appellant on the grounds of sovereign immunity.

Respectfully submitted,

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[4] Despite its criticism of the Housing Authority in the timing of raising the immunity defense, the Court of Appeals did not hold that a waiver of the immunity defense had occurred. It denied immunity to the Housing Authority based upon an application of the *Comair* test, a decision that was significantly criticized by Judge Moore in her dissent in the case.